Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 79-1932

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

BRENDA THORNTON, *Petitioner,*

v.

EQUIFAX INC., *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review a decision of the United States Court of Appeals for the Eighth Circuit that reversed and remanded for a new trial a judgment entered on a jury verdict because of multiple errors in instructions to the jury?

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Respondent, Equifax Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the Eighth Circuit is not as yet officially reported, but is appended to the Petition for Writ of Certiorari.

JURISDICTION

The judgment below was entered on February 27, 1980. A timely Motion for Rehearing *en banc* was denied on April 1, 1980. The Petition was docketed on June 7, 1980.

REASONS FOR DENYING THE WRIT

Neither the decision below nor the record in this case fairly raises the only question purported to be presented in the Petition.[1] The Eighth Circuit below did *not* interpret the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (1970) (the "Act") so as to negate the sections creating liability for willful and negligent noncompliance (Sections 1681n and 1681o) as Petitioner implies. To the contrary, the Court simply remanded the case for a new trial to correct multiple errors in the trial court's instructions to the jury. Opinion at pp. A-10-A-11.[2] In addition, the case was remanded for a new trial on grounds not raised in the Petition. Opinion at p. A-18.

I.

The Eighth Circuit Remanded This Case for a New Trial on Grounds Not Raised in the Petition.

The Court of Appeals held that the trial court erred in allowing repeated questioning by counsel for Peti-

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[1] The Statement of the Case in the Petition is replete with errors and mischaracterizations both of the record and of the litigating position of the Respondent. Suffice it to say that Respondent contested the allegations of the complaint vigorously and will do so on remand before a jury that will be instructed properly.

[2] All citations to the Eighth Circuit's Opinion in this case refer to the Appendix to the Petition for Writ of Certiorari.

tioner concerning an alleged failure by Respondent to reveal to Petitioner certain sources of information found in a report prepared by Respondent. The Fair Credit Reporting Act does *not* require that such sources be revealed. Section 1681g(2). The Court of Appeals held that, in such circumstances, the trial court's ruling was prejudicial to the Respondent and erroneous.[3] Opinion at p. A-18.

II.

Since the Eighth Circuit Remanded for a New Trial Due to Confusing and Prejudicial Jury Instructions, This Case Is Not Ripe for Supreme Court Review.

Petitioner herself admits that the Court of Appeals remanded the case to the trial court for a new trial "on the basis of confusing and erroneous jury instructions." Petition at p. 6. However, Petitioner failed to note that the Court of Appeals held that the jury instructions were confusing in several respects: *first,* the instructions were so general that "any distinction made by the Act for qualified immunity in defamation actions and damages for noncompliance complaints

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[3] The Court stated:

> We do find error in the trial court allowing repeated questioning concerning appellant's failure to reveal to Brenda the sources of the information reported. . . .
>
> As Equifax's report was an "investigative consumer report" within the definition of the Act, appellant had no obligation to reveal such sources to Brenda prior to appropriate discovery procedures. . . . That this line of questioning was used by appellee's counsel to prejudice the jury is illustrated in his closing argument. . . . Appellant need not defend a practice which under the Act is proper.

Opinion at pp. A-18-A-19.

could easily have been confused by the jury,"[4] Opinion at p. A-15; *second,* the inclusion of any instruction concerning the local law on cohabitation was "irrelevant to this action and could only have served to confuse the jury," Opinion at p. A-15; and *third,* the instructions did not clarify the circumstances under which punitive damages would be permissible. Opinion at pp. A-16-A-17. Thus, hypothetically, even if there were the kernel of an issue in the question presented by Petitioner, it is mired in a bog of error committed by the trial court and review by this Court at this time would be inappropriate and fruitless. But there is not even such a kernel since the interpretation accorded the Fair Credit Reporting Act by the Eighth Circuit is correct.

III.

The Decision of the Court of Appeals Was Correct.

Contrary to Petitioner's argument,[5] the effect of the opinion of the Eighth Circuit is *not* to read the

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[4] In fact, there *are* different standards of proof required for defamation actions as limited by Section 1681h(e) and actions for noncompliance with the Fair Credit Reporting Act under Sections 1681n and 1681o. The Court of Appeals noted that the jury instructions didn't make these distinctions:

> Attention should have been drawn to the different standards of proof required for the different allegations of defamation and noncompliance so as not to void the effect of the qualified immunity section of the Act. The instructions should have further defined what constituted noncompliance together with a proper definition of 'willful' as it is used in section 1681n of the Act.

Opinion at p. A-16-A-17.

[5] Most of Petitioner's argument consists of a recitation of irrelevant facts, an inaccurate presentation of Respondent's legal position below, and a summary of Petitioner's theory of her case that is unrelated to the question her Petition purports to raise.

limitation of liability section for defamation, invasion of privacy or negligence (Section 1681h(e)) in such a way as to negate the liability for noncompliance sections of the Fair Credit Reporting Act (Sections 1681n and 1681o). The Court of Appeals specifically recognized the availability of the two types of legal actions and enunciated precisely the standards of liability for each.[6] In addition, the Court noted: " '[t]he Act does not preclude an action at common law *except* where information that would give rise to a cause of action is obtained by the complainant pursuant to the provisions of the Act.' " Opinion at p. A-12.

The decision of the Eighth Circuit states precisely the limitations prescribed by the Act. Where the information on which the action is based is disclosed pursuant to the Act's requirements, the information must be false and furnished with malice or willful intent to injure the consumer in order to maintain an action for defamation. The Court made clear, however, that this limitation does *not* apply to actions for noncompliance brought pursuant to Sections 1681n and 1681o. Opinion at pp. A-11-A-12. Having made its position clear, the Eighth Circuit remanded the

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[6] Thus, the Court noted correctly that the Act provides for civil liability for noncompliance where the credit reporting agency fails to meet a requirement listed in any other section of the Act. In addition, the Court held that actions in the nature of defamation, invasion of privacy or negligence ***based on information disclosed pursuant to the Act*** are limited by the Act to situations in which the information is false and furnished with malice or a willful intent to injure the consumer. Opinion at p. A-11.

case with specific instructions to avoid a repetition of the confusion evidenced by the trial judge. Opinion at p. A-11.[7]

IV.

There Is No Basis for Certiorari Under Rule 17.1.

The Petitioner conceded that this is the only opinion to have considered the issue allegedly raised by this case. Petition at p. 16. This Court should not step in prematurely to review a federal decision which is not in conflict with decisions of any other circuit. In addition, no important question of federal law is raised by the remand for clear and concise jury instructions.

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[7] "We, therefore, remand this case to the trial court for a new trial with instructions to separate any future jury instructions under the FCRA as to the allegations and standard of proof appropriate to a defamation action under the Act from those [complaints] of noncompliance as treated under the civil liability sections of the Act." Opinion at p. A-17.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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